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No. 95-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ARGUMENT

I. THE ASSERTED GOVERNMENTAL INTERESTS DO NOT JUSTIFY TERMINATING BUSINESS WITH PETITIONER BECAUSE OF HIS POLITICAL ASSOCIATION.

This case involves governmental abuse of cherished individual freedoms -- participation in the political process through the exercise of rights of association and speech. The City of Northlake's policy of political retaliation, whether denominated as "patronage" or not, destroys the individual's standing as a citizen, insults personal dignity and diminishes self-worth. The policy requires City vendors to kneel before the sovereign, to make financial tribute to the Mayor, and to refrain from speaking in opposition to the Mayor's continued rule. It thus results in forced contribution, forced association, and the suppression of opposing views. Northlake penalizes those who, like Petitioners, refuse to compromise their conscience, values and beliefs, by summarily taking away their livelihoods.

Respondents offer two reasons to justify the retribution which the City has inflicted upon Petitioners for adhering to their beliefs. First, the threat of unwarranted litigation will impair the effectiveness and efficiency of government, including both executive and judicial functions. Resp. Br. 12, 14-15. Second, Respondents also assert that all contractors must be politically loyal to assure efficient government, Resp. Br. at 13, 18-21, a requirement more traditionally asserted as serving an interest in representative government. *See Elrod v.*

Burns, 427 U.S. 347, 367 (1976); *Rutan v. Republican Party*, 497 U.S. 62, 70 (1990).[1] Neither claim justifies the wholesale evisceration of the associational rights of independent contractors.

A. Protecting Petitioners' Right of Political Association and Speech Will Not Impair Effective And Efficient Government Services.

Petitioners recognize that government has a valid interest in ensuring that contractors perform their services in a manner which is effective and efficient. Pet. Br. at 33-35. This interest is not threatened by allowing Petitioners to maintain the integrity of their political beliefs.

1. A flood of unwarranted litigation is not likely.

Respondents first suggest that recognizing the rights of contractors will impair government services by subjecting government to frivolous suits by every unsuccessful bidder. Resp. Br. at 12. The short answer is that there is no empirical support for this assertion.[2] In 1990, the Tenth Circuit held

[1] Illinois Officials also argue that it is difficult to identify the "political affiliation" of a contractor because such an entity may be comprised of multiple individuals. Illinois Officials Br. at 28. If that were true, then the patronage contracting that *amicus* suggests has existed for 200 years would long ago have died due to the inability to select the right contractors to reward or penalize. In any event, the political affiliation of small owner-operated businesses like O'Hare Truck Service, Inc. is easily identified.

[2] This case does not involve "bidders" for future public contracts, but rather the *termination* of an existing commercial relationship. Petitioners so phrased the question presented for review. Pet. Br. at i; *see also* Order granting Writ of Certiorari. Respondents were not "dissatisfied" with Petitioners' statement of the question and did not offer a different one. *Cf.* Supreme Court Rule 24.2. At other places in their brief Respondents also expressly recognize that the issue here is *termination* of a commercial relationship with government. *See* Resp. Br. at 5. Prospective commercial relationships present a different case.

that the First Amendment protects an independent contractor from retaliation against him on the basis of his political associations. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1233 (10th Cir. 1990). The six years since that decision evince not a single reported case in the courts of the Tenth Circuit by an independent contractor alleging retaliation for political association rights. In fact, the only case regarding the First Amendment rights of independent contractors in the Tenth Circuit in the last six years is the free speech case, *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) (No. 94-1654, argued November 28, 1995, *sub nom. Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*).[3]

[3] In arguing that judicial efficiency and effectiveness will be impaired, Respondents contend that *Umbehr*, by recognizing First Amendment rights of contractors, is unworkable and will lead to a never-ending string of lawsuits. Resp. Br. at 14. However, many circuits have protected free speech rights of independent contractors for some period of time without any indication that the courts are overwhelmed or have difficulty applying a free speech standard. See Pet. Br. at 24.

Respondents further argue that recognizing contractors' First Amendment rights would produce a flood of litigation regarding part-time and temporary government employees. Resp. Br. at 14. They state that Petitioners have argued that such employees are entitled to bring First Amendment claims under *Elrod*, *Branti* and *Rutan*. Petitioners have not argued here for the rights of public employees of any status but rather, have suggested that patronage contracting raises issues distinct from patronage employment and that these issues have yet to be addressed fully by the courts. See Pet. Br. at 37-41. However, it should be noted that in more than seven years since the First Circuit definitively held that transitory or part-time employees are protected from politically motivated firings or non-renewals, *see Figueroa v. Aponte-Roque*, 864 F.2d 947, 951 (1st Cir. 1989), Petitioners could identify only two patronage cases filed by such employees in that circuit, *Gonzalez v. Soto-Rios*, No. 93-1557 (D.P.R. July 7, 1995), 1995 U.S. Dist. LEXIS 10365 and *Caraballo v. Hernandez*,

This dearth of reported cases is not happenstance. To prevail in such litigation, the bidder would have to meet the substantial burden of proof prescribed in *Mt. Healthy School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). *See also Cusson-Cobb v. O'Lessker*, 953 F.2d 1079 (7th Cir. 1992); *Gooden v. Neal*, 17 F.3d 925 (7th Cir), *cert. denied*, __ U.S. __, 115 S.Ct. 73 (1994). *Mt. Healthy* would require disappointed bidders to prove that their political association and speech was a substantial motivating factor in the governmental defendant's decision to deny them a contract. Assuming that such a showing could be made, and that itself has proven difficult, *see, e.g., Garrett v. Barnes*, 961 F.2d 629 (7th Cir. 1992), the governmental defendant then could establish as a defense that, even in the absence of this associational conduct, it still would have denied the bidder a contract. *Mt. Healthy*, 429 U.S. at 287. Thus, not only would disappointed bidders have to show they were well-qualified and responsible for the job, but in addition, there was no other permissible reason why they were denied the contract. *Id.*[4] If there are a significant number of cases where this burden can be met, that does not suggest a flaw in the legal rule, but rather

744 F. Supp. 389 (D.P.R. 1990).

[4] Respondents further hypothesize that unwarranted litigation will extend beyond unsuccessful bidders to existing government contractors who lose renewal due to lower bidders or who are replaced by a new administration elected on a mandate requiring replacement of contractors because of the voters' perception of poor services. Resp. Br. at 12. On these facts neither case would survive *Mt. Healthy* requirements and prudent counsel would not, without additional favorable facts, advise filing suit.

reveals a widespread abuse of power by government officials.[5]

2. Government efficiency does not require that all contractors be of the same political affiliation.

Rather than argue a need for political loyalty based on the particular function or service provided by a given contractor, Respondents make the blanket argument that *all* government contractors should be subject to termination based on their political affiliation. Resp. Br. at 13, 18-20. They assert that all contractors perform their services without government supervisors to monitor their work and therefore are like *Branti*-exempt staff for whom political affiliation is an appropriate

[5] Contrary to *amicus* Illinois Officials' claim, their own experience shows that this Court's employment patronage decisions present no significant litigation burden to the State of Illinois. With 73,000 employees, and thousands of employment decisions since 1990, the 21 patronage suits filed in the six years since *Rutan* indicate no problem of any sort. In response to Petitioners' request, *amicus'* counsel provided information on 21 cases (as opposed to the 18 referred to in their brief), refusing, however, to provide agreements in the settled cases. That information, along with information from plaintiff's counsel in those cases, shows the following dispositions of the First Amendment claims. 1) None of the cases involves an issue of whether the position is exempt under *Branti*. 2) Nine of the cases, more than 40% of the total number filed, settled (one is yet to be formalized). In each of the five settled cases on which Petitioners could obtain information from plaintiff's counsel, the plaintiffs received the employment position in controversy. 3) The state won six cases by summary judgment: the *Mt. Healthy* requirements were applied; insufficient proof of motivation was found in five cases; motivation was not reached in one case due to a sufficient defense of alternative permissible justification (pending on appeal). 4) The State lost one case for declaratory relief (pending on appeal). 5) Three of the cases are pending in the district court. 6) Two cases were voluntarily dismissed. Also, about half of the cases appear to involve systemic problems in promotion in two specific positions: six of the cases involve promotions to lieutenants in the Department of Corrections; four of the cases involve promotion to stationary engineer at three different agencies.

requirement. *Id.* at 18-20. Respondents also argue, without further explanation, that contractors control the manner and method of performance and that therefore the government must retain some method of control "without having to wait for a disruption" of service. *Id.* at 13. These arguments disregard contract law, pervert the true interests of independent contractors and distort the holding of *Branti*.

First, Respondents and other governmental bodies can and do include in their contracts any performance requirements, including manner and method of performance, that they deem necessary or appropriate. To the extent that government wishes to embody such specific terms into a contract, it is free to do so. Second, independent contractors are dependent on their reputation in the field in which they work. It is contrary to common sense to believe they, as a class, are likely to provide poor services intentionally. Resp. Br. at 20. Finally, this Court has appropriately ruled that not all government supervisory staff are exempted from constitutional protection of association and belief under the *Branti* exception. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Indeed, towing abandoned cars upon request by government personnel, the service which Petitioners provide, does not remotely require consideration of the factors defining positions exempt under *Branti*. See Pet. Br. at 36.[6]

[6] This Court need not address the issue of contractors who perform services where party affiliation is an appropriate requirement. In the context of public employment the government has the burden to show the need for political loyalty as a matter ". . . of proof, or at least argument directed at particular kinds of jobs." *Elrod*, 427 U.S. at 368 (plurality) (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)). Based on the lack of justification provided by Respondents, this Court may grant relief to Petitioners by holding that whatever the government interest may be in retaining politically affiliated contractors, that interest does not implicate the Petitioner's towing service operation.

B. The Interest In The Democratic Process.

In seeking to justify terminating a government contractor based on political affiliation, the interests Respondents expressly state are less telling than those which they have chosen to omit. While Respondents make a few passing references to the history and tradition of patronage, nowhere do Respondents (or their supporting *Amicus*) argue that the democratic process actually is served by Mayor Paxson requiring contributions to his campaign as a condition of Petitioners' continued receipt of the benefits of City-related business. *See Rutan v. Republican Party*, 497 U.S. at 92 (Scalia, J. dissenting); *Branti*, 445 U.S. at 522 (Powell, J. dissenting).

As Petitioners stressed in their opening brief, the interests associated with employment patronage as preserving the democratic process are even less likely to be served by contract patronage. Pet. Br. at 37-41. The Illinois Officials only reinforce the validity of this point. Illinois Officials Br. at 15-16. They cite the recent campaigns of Steve Forbes and Ross Perot as confirming the *Rutan* dissenting view that limits on patronage will lead to replacing older methods of campaigning with media and money intensive-techniques to the detriment of the political system. Whatever one's views may be on the impact on the political process of these particular

campaigns, contract patronage increases the use of these newer campaign techniques because it generates only money, not political participation by the citizenry. Thus, Respondents have failed to support a requirement of political loyalty, whether asserted to serve the interest of efficiency or the interest of representative government. *Elrod*, 427 U.S. at 367.

II. RESPONDENTS' RETALIATORY POLICY VIOLATES RIGHTS OF POLITICAL AFFILIATION UNDER ANY STANDARD OF CONSTITUTIONAL REVIEW.

Respondents argue that the proper standard to be applied in determining whether political affiliation can be required generally for municipal contractors is a standard of reasonableness, as used in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). Resp. Br. at 15. They further argue, borrowing from public employee speech cases such as *Pickering v. Bd. of Educ.*, 391 U.S. 562 (1968), and *Connick v. Meyers*, 461 U.S. 138 (1983), that "a wide degree of deference" be given the City's judgment. Resp. Br. at 15.

All contractors, simply because they do business with government, are not the equivalent of government employees. Thus, the starting point of any analysis should be the assumption that contractors are no different from the general citizenry, whose political speech and associational activities have the highest protection; therefore, government efforts to abridge these rights must be subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976). Consequently, Petitioners do

not seek to be treated as if they were public employees, looking only to *Elrod, Branti* and *Rutan* for protection. The rights to choose one's own political affiliations, to be free from compelled association and support, and to be free from viewpoint suppression are rights that this Court consistently has reaffirmed in cases arising outside of the employment context, both before and after the *Elrod, Branti* and *Rutan* decisions. Petitioners' rights are rooted in that larger body of precedent. See Pet. Br. at 9-21.

Even assuming, however, that this Court's public employee decisions do provide the appropriate framework to judge this restraint on the political affiliation of non-employees, it does not automatically follow that a mere test of "reasonableness" under *Mitchell* is the touchstone. Commitment to, and association to advance, political belief takes various forms, from simply joining a political party, to making campaign contributions, to pure speech itself, like displaying signs on one's private property. When these fundamental rights are at stake, this Court has applied heightened scrutiny. *Elrod*, 427 U.S. at 362.

Contrary to Respondents' reliance on them, this Court's decisions upholding the Hatch Act do not support some less stringent test for contract patronage. The Hatch Act, with its implementing Civil Service Commission regulations, left federal employees free to express opinions privately and publicly on political subjects and candidates, and to make financial contributions to political parties and organizations. *United States Civil Service Commission v. National Association of*

Letter Carriers, 413 U.S. 548, 576 n. 21 (1973). In fact, the Act's regulations explicitly allowed all of the speech and associational activities in which Petitioners engaged here. *Id.* (citing 5 C.F.R. § 733.111 (a)(2) (expressing opinions privately and publicly); (a)(3) (displaying pictures, badges); (a)(5) (being a member of a political party); (a)(8) (making financial contributions); (a)(10) (taking an active part in a nonpartisan election)).

Moreover, in contrast to contract patronage, the Hatch Act is neutral.

> [Its] restrictions . . . on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

Letter Carriers, 413 U.S. at 564. The contract patronage practices implicated here are neither neutral, nor equally applicable to all partisan activities. They are directed at non-supporters of the incumbent only -- others are free to politic without penalty. They are aimed at a specific point of view and clearly seek to control political opinion.

The Hatch Act also is distinct from contract patronage in its underlying government interests. The Act advanced not only operational efficiency but also public employees' First Amendment rights by making sure that they were free from coercion to support or vote for the party in power. *Letter*

Carriers, 413 U.S. at 566.[7] In contrast, Northlake's associational restraints could never be characterized as protecting the political independence of contractors. *Mitchell* and *Letter Carriers* involved associational restraints so limited in comparison to Northlake's requirement of total fealty, as well as interests motivated by beneficent purposes beyond "operational efficiency," that these cases support rather than negate the appropriateness of using strict scrutiny here.

In *Elrod*, this Court rejected a request to use the less rigorous test of *United States v. O'Brien*, 391 U.S. 367 (1968), identifying the aspects of patronage justifying strict scrutiny review. Those observations about employee patronage are equally relevant to rejecting a test of "reasonableness" for contract patronage. First, patronage practices seek to control "association and belief *per se*." *Elrod*, 427 U.S. at 363 n.17. Patronage also involves "'suppressing communication.'" *Id.* (quoting *Buckley*, 424 U.S. at 17). Finally, patronage practices "focus on the ideas expressed by the persons or groups subjected to" them. *Elrod*, 427 U.S. at 363 n. 17 (quoting *Buckley*, 424 U.S. at 17).

Contract patronage is no different. Therefore, even if the public employment cases are the proper framework in which to consider Petitioners' claim, the heightened test of *Elrod*,

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[7] Petitioners discuss, *infra*, Northlake's asserted interest in contract patronage, which is simply operational efficiency. In *Elrod*, this Court considered and rejected additional interests posited in favor of employment patronage as interests of partisan organizations, not of government. "Only the latter will suffice." *Elrod*, 427 U.S. at 362. *See also Rutan*, 497 U.S. at 73 n. 4.

not the reasonableness test of *Mitchell* must be used. Such strict scrutiny is required because contract patronage is a partisan-motivated and enforced, viewpoint based, blanket restriction on political association and related speech.

However, even if a reasonableness test drawn from *Mitchell* and the employee speech cases were applied to this non-employee political affiliation case, government's interests are insufficient to justify this wholesale denial of First Amendment freedoms. A *Pickering* balance must be made, case-by-case. *Pickering*, 391 U.S. at 570. *See U.S. v. National Treasury Employees Union*, __ U.S. __, 115 S. Ct. 1003, 1020 (1995)(O'Connor, J., concurring). *See also Waters v. Churchill*, __ U.S. __, 114 S. Ct. 1878, 1887 (1994) (plurality) (warning that in the context of employer regulations of employee work-site speech, some circumstances will require "a more substantial showing that the speech is, in fact, likely to be disruptive").

In justifying its broad restraint on the basis of "anticipated harms," Northlake "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *National Treasury*, 115 S. Ct. at 1017, quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. __, 114 S. Ct. 2445, 2470 (1994). As Justice O'Connor warned in her concurrence in *National Treasury*, "the bare assertion of a laudable purpose" will not justify "wide-ranging intrusions on First Amendment liberties." *National Treasury*, 115 S. Ct. at 1021 (O'Connor, J., concurring).

Here, Respondents define their interest only as a speculative threat to operational efficiency. Resp. Br. at 17, 19-20. But far from making any showing of real harm as *National Treasury* would require, the City relies on a "bare assertion" that patronage practices are necessary for efficient control of public services. For 30 years, notwithstanding his political affiliation, John Gratzianna and O'Hare Truck Services performed competently in every respect. The City thus has completely failed to assert any "necessary impact on the actual operation of government" caused by contractors' affiliation that a *Pickering* balance requires. *National Treasury*, 115 S.Ct. at 1014, quoting *Pickering*, 391 U.S. at 571.

Just as this Court in *National Treasury* rejected government's interest in preventing actual and perceived corruption because its ban on honoraria for non-work-related speech was unsupported by a showing of harm, Respondents' interest here is too attenuated to support its restraint on Petitioners' nongovernmental-worksite associational activities. Accordingly, Respondents' interest in contact patronage cannot be said to be weighty.

Against this insubstantial interest must be weighed the "breadth and intrusiveness" of its punitive action. *National Treasury*, 115 S. Ct. at 1020 (O'Connor, J., concurring). This side of the balance weighs not just contractors' own interests in being able to manifest political beliefs with financial contributions and candidate affiliation, but also those with whom contractors would associate for political purposes as well as the candidates who would receive and use those contribu-

tions. *See National Treasury*, 115 S.Ct. at 1015 (considering the "significant burden on the public's right to read and hear what [government] employees would otherwise have written and said"). Obviously, these First Amendment interests far outweigh Northlake's assertions of interest and must prevail in this *Pickering* balance.

Accordingly, if a lower-tier standard of review drawn from *Mitchell* and the public employee speech cases were applied to this political association case, the balance is decidedly in Petitioners' favor. Northlake's "bare assertions" of need for control to enhance efficiency are not sufficiently substantial to support wholesale contract patronage.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THE RECONSIDERATION OF *RUTAN*, OR *ELROD* AND *BRANTI*, AND THE DOCTRINE OF *STARE DECISIS* COUNSELS STRONGLY AGAINST THEIR REEVALUATION.

Both Respondents and *Amicus* Illinois Officials urge the Court to use this case to overturn *Rutan*, and *Elrod* and *Branti* as well. Respondents' request, which was not presented for consideration to the courts below nor included in the question on which certiorari was granted, should be denied. Not only is this case factually distinct from the employee patronage cases but reconsidering these cases here also would result in adjudicating the rights of millions of individuals -- public employees -- who are not before the Court.

Respondents' belated effort to present a new question for argument in their brief on the merits disregards Rule 14.1(a).

See Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 1532 (1992). It also attempts a litigation strategy disapproved by the Court. *See California v. Acevedo*, 500 U.S. 565, 573 n. 2 (1991) (refusing to consider respondent's argument, not previously raised in Brief in Opposition or in any cross-petition).

Respondents cannot evade this rule by arguing that the new question was "fairly included" within the question on which certiorari was granted. The First Amendment rights that Petitioners claim exist independent of the employee patronage issues raised in *Elrod, Branti* and *Rutan*. Pet. Br. at 9-21. Further, the employment decisions at issue in *Rutan* -- hiring, promotions, transfers and recall -- present no factual parallel to Respondents' *termination* of Petitioners' commercial relationship. *Cf. Lebron v. National Railway Passenger Corp.*, ___ U.S. ___, 115 S.Ct. 961 (1995)(question "fairly included" within certiorari question when it was ruled on by the lower courts and when, given the facts plead by petitioner, it was "prior question" necessarily reached in order to consider the question explicitly presented). Finally, Respondents have not even attempted to make the requisite showing that this is such an "exceptional case" that they should be permitted to raise new arguments that they failed to raise below. *See Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (claim of ineffective assistance of counsel as not meeting "exceptional case" requirement).

More importantly, this Court should not re-examine *Rutan* in a case where the persons whose interests are directly at

stake -- public employees -- are not before the Court. The Court long has cautioned that "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 US 106, 113 (1976). O'Hare Truck Service, an independent contractor, cannot, and does not purport to, represent the interests of any public employees. It would work a great unfairness to all present and prospective government employees to so substantially adjudicate their rights in a case where their interests are not represented.

The doctrine of *stare decisis*, of fundamental importance to the Court and the country, also counsels against re-examining *Rutan*. *See Hilton v. South Carolina Railways Com'n*, 502 U.S. 197, 112 S.Ct. 560, 563 (1991). Any departure from *stare decisis* "`demands special justification,'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)(*quoting Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)), which Respondents have not provided.

The Constitution requires, and this Court consistently has provided, paramount protection for the core First Amendment rights of political speech and association. Pet. Br. at 9-21. And, for the reasons set forth in the both the majority opinion and the concurrence of Justice Stevens, *Elrod* and its progeny are not unsound in principle. These cases, Petitioners contend, "fit[] comfortably within the framework of the Court's prior decisions, . . . the holdings of which are `not a series of isolated points,' but mark a `rational continuum.'"

Cf. Planned Parenthood of Southeastern Penn. v. Casey, __ U.S. __, 112 S.Ct. at 2811 (1992) (*quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

Empirically, there is no support for the Respondents' and *amicus'* further argument that these cases should be overruled because lower courts or public officials are confused. A large majority of cases raising *Elrod-Branti-Rutan* claims are easily disposed of prior to trial, either through settlement or motions to dismiss or summary judgment.[8]

Where cases are not so resolved, the issue precluding summary disposition in most cases is not, contrary to *Amicus'* contention, judicial uncertainty about whether the plaintiff seeks or occupies an employment position for which political affiliation is not an appropriate requirement. (Illinois Officials Br. at 20-21.) Rather, the material issue of unresolved fact commonly involves whether the adverse action taken against the employee was politically motivated.[9]

The purportedly inconsistent rulings complained of by *amicus*, Illinois Officials Br. at 20 n. 5, reflect and respect the diversity of our federalism, including the fact that individuals who share similar job titles exercise widely disparate lev-

[8] From January 1, 1994 through March 11, 1996, there were 43 reported decisions on defendants' motions to dismiss or for summary judgment in cases challenging politically motivated employment actions on *Elrod, Branti* and/or *Rutan* grounds. Of those decisions, 32 granted the dispositive motion. See also analysis of the Illinois Officials' litigation *supra* at 5 n.5.

[9] *See Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 706 (1st Cir. 1993); *Helm v. Board of Trustees*, 1994 U.S. Dist. LEXIS 15247, No. 92 C 5118 (N.D. Ill. October 26, 1994) (same); *Kelly v. Municipal Court of Marion County*, 852 F. Supp. 724, 729 (S.D. Ind. 1994) (same).

els of responsibility depending upon the state or locality in which they are employed.[10] Such fact-specific assessment of various practices claimed to restrict fundamental First Amendment rights, including those claimed here by independent contractors, fall well within the appropriate judicial role. *Cf. Casey*, 112 S. Ct. at 2809.

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[10] Thus, the fact that the Fourth Circuit held that a West Virginia highway superintendent was protected from politically motivated discharge, when he or she is seven rungs below the Governor on the organization chart, and has virtually no discretion regarding the operation of his or her office, *see Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993), is not inconsistent with a finding that a New York highway superintendent is not protected from politically motivated discharge when that superintendent is responsible for approximately one-sixth of the town's budget, has sixty employees reporting to him, develops public relations campaigns for his department and frequently makes public speeches on behalf of his department. *See Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994). *Cf. Selch v. Letts*, 5 F.3d 1040, 1047 (7th Cir. 1993) (highway superintendent developed plans, guidelines and policies to supervise contractors, managed more than sixty employees with a budget of over $1 million and "could decide where and when [maintenance] work was to be completed"), *cert. denied*, 114 S. Ct. 1189 (1994).

The alleged inconsistency in rulings regarding deputy sheriffs is similarly a function of different factual situations, not judicial confusion or uncertainty. In *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992), *rehearing denied*, 978 F.2d 718 (11th Cir. 1992), where the court held that political affiliation was not an appropriate consideration, the sheriff had implemented guidelines stating that personal political loyalty was not a prerequisite for deputy sheriffs and the sheriff made no allegation that the plaintiff's statements did or could disrupt the office. In contrast, in *Upton v. Thompson*, 930 F.2d 1209, 1216 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992), the plaintiff was the chief deputy in a very small department, was the brother of the outgoing sheriff (whom the incoming sheriff had been very critical of in the election), and had actively led a group of employees against the new sheriff. The *Upton* court also explained that part of the inconsistency between jurisdictions on this issue is based on variations in the applicability of local civil service provisions.

Neither Respondents nor *Amicus* identify any changed circumstances sufficient to justify overruling this Court's public employment patronage cases. The arguments they raise were considered by and rejected by this Court in *Elrod*, and then again in *Branti* and *Rutan*. *See Rutan*, 497 U.S. at 82-92 (Stevens, J. concurring). As this Court has admonished before, "[i]t should go without saying that the vitality of . . . constitutional principles . . . cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education II*, 349 U.S. 294, 300 (1955). *Cf. Allied-Bruce Terminix Companies, Inc. v. Dobson*, __ U.S. __, 115 S. Ct. 834, 838-39 (1995).

Finally, it must be noted that "[t]he Constitution serves human values." *Casey*, 112 S.Ct. at 2809. Although the classic reliance case arose in the commercial context, this factor also is critical in cases implicating fundamental rights. *Id.* In response to *Elrod*, state and local governments have instituted apolitical employment systems; thus, public employees over two decades have come to rely upon these classifications and the protection the First Amendment affords their rights. Overruling *Elrod, Branti* and *Rutan* would produce massive upheavals in the public workplace and leave public employees and other citizens wondering whether the rules on which they rely in ordering their affairs are "rules of law" or "merely the opinions of [those] who temporarily occupy high office." *See Florida Department of Health and Rehab. Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981)(Stevens, J., concurring).

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed. The case should be remanded to the United States District Court for the Northern District of Illinois.

Respectfully submitted,

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